STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW KONENSKI, Plaintiff-Appellant,	UNPUBLISHED May 11, 2004
v	No. 245244 Oakland Circuit Court
PULTE HOMES OF MICHIGAN CORPORATION, Defendant-Appellee.	LC No. 2001-032112-NO

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition to defendant under MCR 2.116(C)(10). We affirm.

Plaintiff was employed by Straight Cut Builders, a subcontractor hired by defendant to perform rough framing of a house under construction. He was injured when a prefabricated staircase collapsed. The staircase was installed about four days before the accident by plaintiff's foreman, who admitted that he failed to finish installing it.

When reviewing a motion for summary disposition decided under MCR 2.116(C)(10), the court must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff first argues that summary disposition was inappropriate as to his premises liability theory. "Whether a defendant owes any duty to a plaintiff to avoid negligent conduct in a particular circumstance is a question of law for the court to determine." *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997).

"Generally, a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure." *Id.* at 9. "[A] premises owner does not have a duty to protect invitees where conditions arise from which an unreasonable risk cannot be anticipated." *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 535, 537; 542 NW2d 912 (1995). "[L]iability for defectively maintained premises should rest upon the party who is in control or possession of the premises and, thus, is best able to prevent

the injury." *Hughes, supra,* at 11. Here, plaintiff's employer was hired to rough frame the house, and the alleged defect was caused by its foreman's failure to finish installing the stairs. Thus, while defendant had a duty to inspect the premises, and to either repair any discovered defects or warn its invitees, there was no defect or danger to be corrected or warned about when defendant invited plaintiff's employer to come onto the premises to rough frame the house. The foreman's negligence created a condition from which an unreasonable risk could not have been anticipated. See *Butler, supra* at 535, 537. Further, under a premises liability theory, it would not make sense to impose upon defendant a duty to discover, warn about, or correct a defect created by a subcontractor's negligence, which the subcontractor was contractually required to correct. In sum, defendant was entitled to summary disposition of plaintiff's premises liability claim.

Plaintiff also argues that summary disposition was not warranted as to his claim of active negligence by defendant. Plaintiff argues that defendant was actively negligent in improperly instructing its subcontractors concerning how to install prefabricated stairs. We disagree.

"When a person voluntarily assumes a duty not otherwise imposed by law, 'that person is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task.'" *Zine v Chrysler Corp,* 236 Mich App 261, 277; 600 NW2d 384 (1999), citations omitted. Here, however, the evidence does not show that defendant instructed plaintiff's employer or its foreman how to install prefabricated stairs. Thus, it is unnecessary to consider plaintiff's expert's claim that defendant was negligent by failing to instruct plaintiff's employer to use bracing or toe boards during installation. Additionally, the evidence did not show that the method of installation was the proximate cause of the accident. Rather, it is undisputed that the staircase fell because plaintiff's foreman admittedly failed to complete the installation. Therefore, defendant was entitled to summary disposition of plaintiff's active negligence claim.

Next, plaintiff argues that defendant negligently entrusted a dangerous instrumentality to an inexperienced subcontractor. The theory of negligent entrustment imposes liability on "[o]ne who supplies . . . a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use." *Moning v Alfono,* 400 Mich 425, 443-444; 254 NW2d 759 (1977), quoting 2 Restatement of Torts, 2d, § 390. However, this case does not involve the use of a "potentially dangerous instrumentality." Cf. *Moning, supra* at 443-444. Further, while defendant knew how prefabricated stairs were usually installed, there was no evidence that it knew that the installation of these stairs was going to be left unfinished. It is undisputed that the stairs collapsed, not because of the method by which they were usually installed, but because the installation process was never finished. Therefore, summary disposition was proper as to plaintiff's negligent entrustment theory.

Contrary to plaintiff's argument, "Michigan has *not* recognized a duty requiring an employer to exercise care in the selection and retention of an independent contractor . . . [and] such a duty does not exist." *Reeves v Kmart Corp,* 229 Mich App 466, 475-476; 582 NW2d 841 (1998) emphasis added. Therefore, summary disposition of plaintiff's negligent selection or retention claim was proper.

Plaintiff next attempts to invoke each of the three exceptions to the general rule that "a general contractor is not liable for a subcontractor's negligence." *Hughes*, *supra* at 5; see also *Ghaffari v Turner Constr Co*, 259 Mich App 608, 615; 676 NW2d 259 (2003). The three exceptions are: (1) retained control; (2) common work area; and (3) inherently dangerous work. *Id.* at 615-617; see also *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 173; 660 NW2d 730 (2003).

Under the retained control exception, a general contractor may be held liable for an injury caused by a subcontractor "where the general contractor retains control over the work of the negligent subcontractor." *Ghaffari*, *supra* at 615. "[H]aving control over general oversight and safety standards alone is insufficient to constitute retained control." *Id.* at 616; see also *Ormsby*, *supra* at 181. Rather, "[t]here must be a *high degree of actual control*" over the subcontractor's work, and "general oversight or monitoring is insufficient." *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994) (emphasis added). "At a minimum," the contractor's "retention of control must have had some *actual effect* on the manner or environment in which the work was performed." *Ormsby*, *supra* at 179, quoting *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 76; 600 NW2d 348 (1999), emphasis in original.

In this case, the evidence indicated that defendant exercised some control over its subcontractors in an effort to build homes of consistently high quality. To that end, defendant often required that things be done, or not done, in a specific manner, and that certain systems be used. Defendant also conducted quality and safety inspections. However, defendant's construction manager testified that, while subcontractors enter into written agreements addressing quality standards, "[t]he supervision of the construction of that home by that rough[-]framing contractor is his." He also testified that defendant could not afford to hire a crew to supervise its rough-framing subcontractors, and that it would not want to assume responsibility for running its subcontractors' businesses. Similarly, plaintiff's foreman testified that, although he knew how defendant liked to have things done, he could not "really say that I seen (sic) they've indicated how to do the stairs." He agreed that defendant left the method of installation of the stairs to the subcontractor's discretion. The evidence shows only that defendant exercised general oversight and quality monitoring, not that it exercised a high degree of actual control over how the rough-framing was performed. Therefore, the trial court did not err in dismissing plaintiff's retained control claim.

Under the common work area exception, "a general contractor may be held liable if it failed to take 'reasonable steps within its supervisory and coordinating authority' to guard against 'readily observable, avoidable dangers in common work areas which create a high risk to a significant number of workmen.'" *Hughes*, *supra* at 5; see also *Ghaffari*, *supra* at 616. "Thus, for there to be liability, there must be (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several contractors, (3) a readily observable avoidable danger in that work area, (4) that creates a high risk to a significant number of workers." *Hughes*, *supra* at 6; *Ghaffari*, *supra* at 616. "[T]he employer's duty does not depend on the subcontractor's behavior or fault." *Ormsby*, *supra* at 175. Additionally, contrary to defendant's argument, "[i]t is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely

requires that employees of two or more subcontractors [will] eventually work in the area." *Hughes*, *supra* at 6.

In the present case, defendant concedes that it has supervisory and coordinating authority over the job site. Additionally, while no other subcontractors would be working in the home until the rough-framing was finished, it is undisputed that the employees of many other subcontractors—plumbers, painters, electricians, drywallers, carpet layers, and many more—would eventually be working inside the home, some before the rough-framing inspection, and that all of them would be at risk if the stairs were not fully installed. Thus, we disagree with the trial court's determination that the home, and the staircase in particular, was not a common work area.

However, as the trial court also observed, there was no evidence that the incomplete installation was a "readily observable" danger. While plaintiff's foreman believed that plaintiff and the other framers knew, from "the way they were in there," that the staircase was not finished, plaintiff testified that he did not notice anything unusual when he walked up the stairs. Similarly, another framer testified that he used the stairs all day and believed they were finished. Additionally, defendant's construction manager testified that, unless you were specifically looking, it would not be obvious whether the stairs had been fully installed. Therefore, although there may have been clues that could have alerted an observant person to the fact that installation had not been completed, there is no evidence that the incomplete installation was "readily observable." Therefore, the trial court properly dismissed plaintiff's common work area claim.

Lastly, a contractor may be held liable for a subcontractor's negligence "where the work is an 'inherently dangerous' activity." *Ghaffari*, *supra* at 616, quoting *Ormsby*, *supra* at 175. However, the inherently dangerous work exception does *not* apply to cases where an injury results from an activity that is "collateral to the employment, like the dropping of material by [an employee] of a contractor upon a person passing by." *Ormsby*, *supra* at 175, citations omitted. Rather, a nondelegable "duty is imposed upon the employer in doing work *necessarily involving danger to others*, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger." *Ormsby*, *supra* at 175, emphasis added. This duty is "closely akin to, but not exactly the same as, strict liability.'" *Ormsby*, *supra* at 175, citations omitted.

In the present case, both plaintiff's foreman and defendant's construction manager testified that rough-framing is dangerous work, and that falls and other accidents are common. The foreman had even heard of prefabricated stairs collapsing before. But the witnesses' characterization of the work as dangerous is not dispositive. In *Ormsby*, witnesses similarly testified that they considered the plaintiff's business as involving inherently dangerous work, but the Court nonetheless concluded that the defendant was entitled to summary disposition, explaining:

> [A] layperson's use of the phrase "inherently dangerous" to describe plaintiff's work does not create an issue of fact regarding whether plaintiff's work was, under the legal definition, "inherently dangerous." Plaintiff failed to cite any testimony that the work presented a peculiar risk or a special danger[,] known at the time of contracting[,] that called for special or reasonable precautions.

> Therefore, the trial court did not err in granting summary disposition of plaintiff's claim under the inherently dangerous [work] exception. [*Ormsby*, *supra* at 190-191.]

These observations are equally applicable to this case. Further, although plaintiff's expert opined that the usual method for installing a prefabricated staircase was unsafe, the undisputed evidence showed that this accident did not occur because of the installation method used. Rather, the staircase collapsed because installation was never completed.

We conclude that plaintiff failed to show a genuine issue of material fact with regard to whether installation of prefabricated stairs is foreseeably and peculiarly dangerous to others, unless special precautions are taken. Therefore, the trial court properly dismissed plaintiff's inherently dangerous work claim.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot